

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

BERNE CORPORATION,)	
B & B CORPORATION,)	
)	
Plaintiffs,)	
)	
v.)	Civ. No. 2000-141
)	
GOVERNMENT OF THE VIRGIN ISLANDS,)	
ROY MARTIN, Tax Assessor,)	
)	
Defendants.)	
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TWENTY-ONE QUEEN'S QUARTER, INC.,)	
)	
Plaintiff,)	
)	
v.)	Civ. No. 2000-167
)	
VIRGIN ISLANDS BOARD OF TAX REVIEW)	
and ROY MARTIN in his capacity as)	
TAX ASSESSOR,)	
)	
Defendants.)	
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APPEARANCES :

James M. Derr, Esq.
St. Thomas, U.S.V.I.
For the plaintiffs,

Richard M. Prendergast, Esq.
Wayne G. Anderson, Esq.
Assistant Attorneys General
St. Thomas, U.S.V.I.
*For the defendants Government of the Virgin Islands and
Roy Martin.*

MEMORANDUM

MOORE, J.

Rather than do what the law says they must do, that is, use actual value to assess real property for taxes, the Government of the Virgin Islands and Roy Martin ["Martin" or "tax assessor"] [collectively "plaintiffs"] have instead moved to stay proceedings in this matter pending their appeal of this Court's September 21, 2000 order ["September 21st Order"] granting Berne Corporation's ["Berne"] and B & B Corporation's ["B & B"] [collectively "plaintiffs"] motion for a preliminary injunction. The Court will deny the motion in part, and grant it in part, staying only the preliminary injunction, and requiring the case to proceed expeditiously to trial on December 4, 2000.

I. DISCUSSION

It is well-established that "an interlocutory injunction appeal . . . does not defeat the power of the trial court to proceed further with the case." 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3921.2 (2d ed. 1996) ["WRIGHT, MILLER & COOPER"]. In this respect, "the effects of an interlocutory appeal are quite different . . . from the effects of a final judgment appeal." *Id.* (footnote omitted).¹

¹ WRIGHT, MILLER & COOPER continue:

The delay and disruption alone would be costly. More important,

So firmly-rooted is the rule, that the Court of Appeals occasionally reminds the trial courts of their duty to proceed with a case despite the pendency of an interlocutory appeal. *See, e.g., United States v. Price*, 688 F.2d 204, 215 (3d. Cir. 1982) ("We assume that the case will proceed forward expeditiously in the district court despite the pendency of the § 1292(a) appeal in this court."). Accordingly, this case will proceed to trial on the merits.

Further, with a trial date scheduled for December 4, 2000, there is no reason for the government to seek a motion to stay all proceedings in this matter, other than to further delay the resolution of this dispute past the six years already caused by the inaction and incompetence of the administrative agencies charged with the task of evaluating real property and assessing real property taxes in the Virgin Islands. The remarkable record of delay and institutional incompetence noted a decade ago by the Court of Appeals in *Anchorage Associates v. Virgin Islands Board of Tax Review* has escalated to an astounding record of delay and

cases involving injunctive relief are apt to present an urgent need for action. An injunction can seriously disrupt the affairs of those bound by it. . . . Continuing trial court proceedings, moreover, often pose little threat to orderly disposition of the appeal; ordinarily the scope of the appeal will be limited to consideration of the preliminary injunction decision itself, despite the power to reach out to other matters.

Id. (footnote omitted).

incompetence. See 922 F.2d 168, 171 (3d Cir. 1990) ("This case presents a remarkable record of delay and institutional incompetence.").

The Board of Tax Review's inability and recalcitrance in flouting the statutory mandate that it hear all appeals within sixty days of filing is legendary in the courts of the Virgin Islands. Chief Judge Christian noted the practice two decades ago when he wrote "the Court is also cognizant of the Board's failure to comply with the statutory time limits for holding a hearing and for rendering a decision on petitioner's appeal." *Maloney v. Board of Tax Review*, 17 V.I. 326, 328, 1980 U.S. Dist. Lexis 8915 (D.V.I. 1980). There, the Tax Board had taken double the sixty days required under 33 V.I.C. § 2452 to hear the plaintiff's tax appeal, a relatively short delay of only two months.

A decade later, Acting Chief Judge Brotman held that the Tax Board's delay and incompetence, which was by then exceeding the statutory mandate by seven months, denied taxpayers procedural due process. The following is upon remand from the Court of Appeals and its observation of the Tax Board's "remarkable record of institutional delay and incompetence":

Anchorage, a group of owners of a number of condominium units at Watergate Condominiums, St. Thomas, properly challenged their 1981 tax assessments by paying those assessments and filing a refund

petition in 1982 before the Board. See 33 V.I.C. § 2451(a), (b) (1989). Although the appeals were filed on or before September 15, 1982, the Board did not hold a hearing to consider their appeals until July 12, 1983, nine months after the appeals were filed, and seven months after the Board was required to hold such a hearing. See 33 V.I.C. § 2452. At the hearing, the Board directed the petitioners to meet with the tax assessor to determine whether any issues could be resolved between them.

After a series of meetings, the tax assessor and petitioners jointly advised the Board at a second hearing that they had agreed on some but not all adjustments, leaving the unresolved issues for the Board to decide. One year later, on July 15, 1984, the Board issued a decision upholding all of the original assessments, notwithstanding the earlier resolution of some of the assessments.

Unsatisfied with the Board's decision, petitioners filed a timely appeal to this court, pursuant to the provisions of 33 V.I.C. § 2453(c). This court granted the writ of review on September 26, 1984 and directed the Board to furnish the court with a certified copy of the record of the second hearing within twenty days.

Almost two years later, on August 7, 1986, the Board had still failed to file a record for this court to review. At that time, this court issued a second order directing the Board to file a certified copy of the record below within thirty days. After some confusion over whether the Board then complied, this court issued a third order, dated November 20, 1986, directing the Board to file a record within thirty days, "failing which the allegations of the petitioners shall be deemed conceded and judgment shall be entered accordingly."

Despite the Board's repeated failure to comply with this court's previous orders, the court issued a fourth order, dated January 28, 1987, directing the Board to file a record within fifteen days. On February 25, almost a month later, the Board filed its first responsive pleading, averring by affidavit dated October 17, 1986 that no transcript or record of the hearing was taken "due to lack of funds" On March 27, 1987, the court remanded the matter to the Board for a new hearing.

On September 9, 1987, nearly six months after this

court remanded the matter to the Board, petitioners filed a motion to reconsider the remand order in light of the fact that they still awaited a new hearing and that the extensive delay was "eroding petitioners' right to due process." In opposition, the Government of the Virgin Islands explained that a mechanical failure had resulted in loss of the transcript and that ongoing reorganization of the Board would delay a new hearing until January 1988. By order dated December 7, 1987, this court directed the Board to conduct a hearing by or before January 15, 1988.

Petitioners did not receive notice of a new hearing until May 11, 1989, nearly eighteen months after the date fixed by this court and over four and one-half years after the writ of review was granted. Anchorage requested a short continuance of the May 25 hearing because its chief witness was temporarily away from the Islands. The Board refused the request and conducted a closed door hearing that day. On June 13, 1989, seven years after the filing of the refund petition, the Board denied relief to petitioners for the second time. This court was not notified of the Board's action.

Anchorage Associates v. Virgin Islands Board of Tax Review, 1991 U.S. Dist. LEXIS 20005 (D.V.I. 1991). The Court ultimately found that the Board's "extraordinary delay . . . violated petitioners' fifth amendment right to due process" and ordered a refund of certain tax payments. *Id.*

This Court and the Court of Appeals are not the only courts to note such incompetence and lawlessness. The Territorial Court recently observed:

After reviewing the transcript of the [Tax Board] hearing, it became evident that the tax assessor did not follow the Virgin Islands Code in determining the value of the property. In fact, he appeared not to know which method, if any, he used to determine the value of the real property. He wavered on inquiries

into which method he utilized. . . .

. . . .

Because the tax assessor's testimony regarding his method of assessment was: (1) replete with unreliable, vague and indefinite statements; (2) lacking in compliance with the provisions of V.I. CODE ANN tit. 33, § 2404; and (3) lacking in evidence to reject the petitioner's expert witness, the Tax Review Board's decision was unsupported by substantial evidence.

Tutu Park, Ltd. v. Writ of Review Virgin Islands Bd. of Tax Review, 38 V.I. 119, 124-45, 1998 V.I. LEXIS 4 (Terr. Ct. 1998).

Over the passage of another decade, the Tax Board delays have increased exponentially. The Board took four years to hear Berne and B & B's appeal. As this Court stated when it granted the preliminary injunction,

the Virgin Islands does not provide a "plain, speedy and efficient remedy" to resolve the disputed assessment. Even though 33 V.I.C. § 2452 requires the Board of Tax Review to hear an appeal within sixty days of its filing, it took four years for the plaintiffs to obtain an inadequate hearing on their 1994 appeal, and another year has passed with no indication that the matter will soon be decided by the Territorial Court. Plaintiffs were prevented from cross-examining the tax assessor about the method he used to calculate the assessment. The acting chairman did not "want to get into an attorney thing" and did not "want to get into that litigation thing." (See Tr. Bd. of Tax Review Hr'g at 57-58, Jan. 15, 1999; Pls.' Ex. 2.) This amounted to a denial of procedural due process. The inadequacy of plaintiffs' territorial remedy is confirmed by the additional year plaintiffs' petition for writ of review has been pending in the Territorial Court.

Berne Corp. v. Government of the Virgin Islands, D.C. Civ. No. 2000-141, slip op. at 15 (D.V.I. Sept. 21, 2000), available at

<http://www.vid.uscourts.gov/00CI141.pdf> ["September 21st Opinion"]. The Court further found that the Tax Board denied plaintiffs procedural due process and sided with the tax assessor, even though he effectively admitted that he violated federal and Virgin Islands statutes by using replacement value rather than actual value.

Regarding the defendants' appeal, their first assertion that the State Tax Injunctive Act deprives this Court of subject-matter jurisdiction is utterly frivolous in this Court's view and provides no basis for a stay. The idea that real property taxpayers are afforded a "plain, speedy and efficient remedy" by the Virgin Islands government is simply preposterous.

The defendants' second assertion that 42 U.S.C. § 1983 is not the proper vehicle to redress excessive property taxation ignores the unique federal statutory mandate that real property in the Virgin Islands be taxed at its actual value.² A section 1983 law suit is the perfect vehicle to require the tax assessor and the Virgin Islands government to comply with federal law, and to hold the tax assessor personally liable. Defendants' second claim also provides no basis for a stay of the orderly proceeding

² It also ignores the likely conclusion that the defendants' record of delay and incompetence amounts to a deprivation of plaintiffs' Fifth Amendment right to due process. See September 21st Opinion; *Anchorage Associates*, 1991 U.S. Dist. LEXIS 20005 ("extraordinary delay . . . violated petitioners' fifth amendment right to due process").

of this case to a trial on the merits in December.

The defendants' third assertion that 5 V.I.C. § 80 does not provide for injunctive remedy also fails, since that statute, like section 1983, independently states a cause of action for restraining government officials from violations of the law.³ As this Court noted in its September 21st Opinion, section 5 goes to the underlying cause of action, not merely the merits of issuing a preliminary injunction:

The plain language of section 80 applies to intentional acts of assessing and collecting taxes that are illegal or unauthorized. There is no dispute that plaintiffs have standing as taxpayers to maintain an action to restrain the allegedly unauthorized actions of the tax assessor.

September 21st Opinion.

Only defendants' fourth assertion that all four factors traditionally required for a preliminary injunction to issue are also required here makes a colorable claim against the viability of the preliminary injunction, that is, that 5 V.I.C. § 80 does not obviate a showing of irreparable harm. For this reason, the Court, while denying to stay all proceedings in this case, will grant a stay of the preliminary injunction only.

II. CONCLUSION

³ Section 80 states in relevant part that "[a] taxpayer may maintain an action to restrain illegal or unauthorized acts by a territorial officer or employee, or the wrongful disbursement of territorial funds."

The Court will deny in part, and grant in part, the motion to stay all proceedings, staying only the preliminary injunction, but allowing the rest of this case to proceed to trial on December 4, 2000. An order of even date follows.

ENTERED this 12th day of October, 2000.

FOR THE COURT:

_____/s/_____
Thomas K. Moore
District Judge

NOT FOR PUBLICATION

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For the plaintiffs,

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Wayne G. Anderson, Esq.
Assistant Attorneys General
St. Thomas, U.S.V.I.
*For the defendants Government of the Virgin Islands and
Roy Martin.*

ORDER

MOORE, J.

For the reasons set forth in the accompanying memorandum of even date, it is hereby

ORDERED that defendants' motion to stay the proceedings in the above-captioned matter is **DENIED IN PART** and **GRANTED IN PART**; it is further

ORDERED that the preliminary injunction is **STAYED** pending its appeal; and it is further

ORDERED that no other proceedings shall be stayed pending this interlocutory appeal; this matter shall proceed to trial on December 4, 2000.

ENTERED this 12th day of October, 2000.

FOR THE COURT:

_____/s/_____
Thomas K. Moore
District Judge

Berne Corp. v. Government
Civ. No. 2000-141
Order
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ATTEST:
ORINN ARNOLD
Clerk of the Court

By: _____
Deputy Clerk

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